Supreme Court, U.S.
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No. 01-1645

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel.
GAUDINEER & COMITO, L.L.P.,

Petitioner,

vs.

GARY GESAMAN, In His Individual Capacity,

Respondent.

On Petition For A Writ Of Certiorari To The Eighth Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Can *Vermont Agency v. U.S. ex rel. Stevens,* 529 U.S. 765 (2000), and the sovereign immunity of the State, be skirted by merely changing the caption of the pleadings?

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STATEMENT OF THE CASE

Much is spoken by omission in Petitioner Relator's recitation. Austin-Gaudineer, a Des Moines law firm, and a private relator under the False Claims Act (FCA), 31 U.S.C. § 3729, *et seq.*, is suing to reap a bounty for alleged fraudulent claims for federal Medicaid reimbursement, by the State of Iowa, through its Department of Human Services (DHS) in the Home and Community Based Waiver program (HCBW). The state program was, for the five years prior to the litigation, one of the responsibilities of DHS employee Gary Gesaman. This case was originally filed in 1997 against the State, its agency, and its employee, Gesaman.

The Department of Human Services through Gesaman was accused of violating its own State administrative regulation only. *See* Iowa Admin. Code 441-83.60. The Iowa regulations and statutes were conceded by the Relator to be in compliance with the federal requirements. The Relator claimed in its original Complaint that Gesaman acted on behalf of the State and its agency. Not until oral argument before the Circuit did the Relator concede that Gesaman could not be sued in his official capacity. (App. 6, n.2) The State has always agreed with the allegations of the Relator, i.e., that Gesaman acted in the State's behalf. Notably, in its Petition for Certiorari, the Relator promotes Gesaman to "director" of the program, apparently to make him more independent. (Petition, p. 7) While the action is brought in the name of the United States, the United States has declined to intervene.

After *Vermont Agency v. United States ex rel. Stevens*, 529 U.S. 765 (2000), Relator dismissed its Complaint

against the State and its agency, and sought to file an Amended Complaint to assert claims against Gesaman in his official and individual capacity, but without changing any of the factual allegations. As the Circuit described it: "[T]he proposed Amendment was almost identical to the original complaint." (App. 5) Relator simply "attempted to add a claim against Gesaman in his individual capacity, for the same acts it had previously alleged he was performing in his official capacity." (App. 8) The Relator omitted previous allegations that Gesaman was acting "for the Defendants State and DHS," but "no new facts were alleged about his role and responsibilities as program administrator or how he may have been acting in his individual capacity." (App. 5) Relator also did not provide "any specifics of the agreements between the United States and Iowa or how Gesaman's actions may have been in violation of those agreements." (App. 9) The Circuit determined that merely changing the nomenclature over the same facts "failed to state a claim."

The Eighth Circuit affirmed the dismissal of the district court, which had found Gesaman, under Relator's pleading, to be the "alter-ego of the state." Relator's suggestion that the opinion was based on grounds "never asserted before the district court" is just wrong. (Petition, p. 8)

SUMMARY OF THE ARGUMENT

The Eighth Circuit did not need to reach Relator's issue, and error has not been preserved. The Circuit affirmed the denial of Relator's request to amend its nomenclature after *Vermont Agency v. United States ex rel.*

Stevens, 529 U.S. 765 (2000), by alleging "individual capacity," but without adding to its pre-*Stevens* allegations that the state employee acted on behalf of the State and its agency. Consistent with this Court's decisions, the distinction between official and personal capacity suits was confirmed to be "more than a mere pleading device" and employees sued in their official capacity are really suits against the State, which are prohibited after *Stevens*.

REASONS FOR DENYING THE PETITION

I. RELATOR'S ISSUE WAS NOT DECIDED BY THE CIRCUIT

The issue as framed by Relator was not ruled upon below and error has not been preserved. The Eighth Circuit found the proposed name-change "failed to state a claim for relief" and was, therefore, futile. Fed.R.Civ.P. 15(a).

> n.3 In light of this conclusion, we need not consider whether a state official sued in his individual capacity is a person under the FCA or whether the claims against Gesaman are barred by the Eleventh Amendment. We also need not reach the issue of whether the term "person" under the FCA should be construed as under Section 1983, a position advanced by relator without citation to any authority.

(App. 9)

II. THE CIRCUIT DECISION IS CONSISTENT WITH *HAFER v. MELO*, 502 U.S. 21 (1991). GESAMAN IS SUED HERE IN HIS OFFICIAL CAPACITY.

Under the Eleventh Amendment, as a general rule, the State or its agency may not be sued directly in federal court. A suit against a State official in his or her official capacity is prohibited as well. *Kentucky v. Graham*, 473 U.S. 159 (1985). State officials, as a general rule, may be sued in their individual or personal capacity. *Hafer v. Melo*, 502 U.S. 21 (1991). There can be no disagreement with the litany of cases cited by the Relator in support of these propositions.

However, an action against a government officer in his official capacity does not become an individual capacity claim simply because of the labels used. When ambiguity appears, as here, a reviewing court must look to the substance of the allegations and the progression of the claim to determine the precise nature of the action. Indeed, the use of the phrase "individual capacity" is not by itself sufficient. *Bender v. Williamsport Area School District*, 475 U.S. 534, 543 (1986) (mere incantation of the term is not enough to transform an official capacity action into an individual capacity, but to "paraphrase our holding in *Brandon v. Holt*, 469 U.S. 464, 469 (1985), '[t]he course of proceedings make it abundantly clear that the action against [Mr. Youngman] was in his official capacity and only that capacity' ").

As this Court made clear in *Kentucky v. Graham*, 473 U.S. 159, 166 (1995), an official capacity action is really an action against the governmental entity, of which the official was merely an agent, and it lies when the entity was the "moving force" behind the conduct. *Hafer* did not

change that requirement. The Court in *Hafer* specifically did not discuss the method by which the individual-official dichotomy is to be reconciled.

> FN The Third Circuit looked to the proceedings below to determine whether certain respondents brought their claims for damages against Hafer in her official capacity or her personal capacity. (Cite omitted.) Several Courts of Appeals adhere to this practice. (Cite to 7th, 10th and 11th Circuits omitted.) Still others impose more rigid pleadings requirements. (Cite to 6th and 8th Circuits omitted.) Because this issue is not properly before us, we simply reiterate the Third Circuit's view that "it is obviously preferable for the plaintiff to be specific in the first instance to avoid any ambiguity."

Hafer, 502 U.S. at *24. "*Will* itself makes clear that the distinction between official capacity suits and personal capacity suits is more than a 'mere pleading device.'" *Hafer*, at 27, citing to *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

Gesaman was originally named as a defendant because of his conduct on behalf of the state and its agency. Having lost the original claim as a result of *Stevens*, the Relator is impaled on the horns of a dilemma of its own creation: liability against the State and its agency was based on the actions of its employee, but when the State is dismissed, the employee is now alleged to have acted individually, *without any further factual allegations regarding that conduct*. The original allegations of agent for the State are mirror images of the current allegation of personal liability.

III. THE CIRCUITS ARE CONSISTENT.

The Fourth and Ninth Circuits have reached similar conclusions. *See Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001) (real party in interest was state in terminated employee's damages action against individual supervisors alleging that termination violated FMLA, regardless of whether complaint purported to be against supervisors in their individual capacities); *Bly-Magee v. California*, 236 F.3d 1014, 1016 (9th Cir. 2000) (if sued in an official capacity, defendants have absolute official immunity, and if sued in individual capacity, defendants are similarly absolutely immune for conduct during performance of official duties).

In *Bly-Magee*, the Ninth Circuit first dismissed the Complaint against the State and its agencies under *Stevens*, but unfortunately did so in language calling upon "sovereign immunity from liability under the FCA." *Id.* at 1017. In *Stevens,* however, the issue of immunity was not addressed. The Ninth Circuit's remaining discussion of whether a valid claim exists for claims against those defendants for "conduct outside of their official duties" is couched in language of "immunity." If viewed as a statutory analysis case, however, *Stevens* directs the discussion toward whether a State administrator is in reality the alter-ego of the State (as is its agency), and, therefore, an impermissible defendant under the FCA. The scope of duties test of *Bly-Magee* is not only appropriate but called-for by *Hafer, Will, Brandon,* and *Alden v. Maine*, 576 U.S. 706, 756-57 (1999) (suit may be pursued "against a state officer in individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself.").

IV. THE PROPOSED AMENDMENT DID NOT COMPLY WITH F.R.C.P. 9(b).

Allegations of "fraud shall be stated with particularity." The FCA is a fraud statute. Defendants accused of defrauding the government have the same pleading protections as those accused of fraud in other contexts. *See United States ex rel. Thompson v. Columbia*, 125 F.3d 899 (5th Cir. 1997); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475 (2d Cir. 1995); *United States ex rel. Cooper v. Blue Cross of Florida*, 19 F.3d 562 (11th Cir. 1994). Petitioner's assertion to the contrary notwithstanding (Petition, p. 17), the requested name-change did not comply. The Eighth Circuit found Relator's pleading void of the required particularity. (App. 5, 8)

This failure under F.R.C.P. 9(b), coupled with knowledge of the "progression of this litigation," leads to the conclusion that, aside from "the elementary mechanics of captions and pleadings" (*Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997)), Gesaman is being sued in his official capacity. Relator concedes that cannot be done.

V. THE CIRCUIT DID NOT DISCUSS, AND THUS DID NOT PRECLUDE, INDIVIDUAL LIABILITY.

Because the Circuit decision is consistent with *Hafer*, the decision will not "absolutely immunize State officials from personal liability," Relator's cry of wolf notwithstanding. It is not the decision which raises this specter, but the omissions in Relator's pleadings. The Relator acknowledges tacitly that this is an official capacity action by reciting identical factual allegations to those made when Gesaman was sued as the State's agent. Barred from

bringing an "official conduct" claim under *Stevens*, but-for the titular incantation "individual capacity," Relator only alleges the identical acts formerly alleged to be on behalf of the state and its agency.

The fears of the Relator can be put to rest. The Eighth Circuit said nothing about the liability of a State administrator sued for conduct in his individual capacity, and thus said nothing about "absolute immunity" for that conduct. (App. 9, n.3) For the reason that Gesaman is actually being sued in his official capacity, which Relator concedes is impermissible, the Relator has failed to state a claim.

VI. THE FALSE CLAIMS ACT WAS NOT INTENDED TO REACH STATE ADMINISTRATORS.

A. The Definition of "Person" in 42 U.S.C. § 1983 Is Not Controlling.

Crucial to the analysis of the Relator is its argument, without citation of authority, that *Hafer's* definition of "person" under 42 U.S.C. § 1983 is equally applicable to the FCA. The Circuit did not reach this question. (App. 9, n.3) It was unnecessary, given the conclusion that Gesaman was still being sued in his official capacity.

Hafer is inapposite. That decision was based on the "broad language" of Section 1983, *Hafer*, 502 U.S. at 28, and was targeted at those "who carry the badge of authority of the State." *Id.*, at 28. "Because of that intent, [this Court] has held that in Section 1983 actions the statutory requirement of action 'under color of' state law is just as broad as the Fourteenth Amendment's 'state action' requirement." *Id.*, at 28. The Circuit did not opine on

whether a similar broad intent could be found in the FCA, and the issue has not been preserved.

B. There Is No "Clear and Unmistakable" Expression of Congressional Intent.

Application of the FCA to States presents an Eleventh Amendment question. The same is no less true for the application of the FCA to a State administrator, when sued for conduct on behalf of the agency. The FCA provides no "unmistakably clear" intent to alter the "usual constitutional balance." *Will*, 491 U.S. at 65. The principle reflects the substantial sovereign powers of the states. *Gregory v. Ashcroft*, 501 U.S. 452, 461, 464 (1991).

The fact that States have historically been exempt from FCA claims supports the construction that State administrators are also. The FCA was adopted in 1863 to combat rampant fraud in Civil War defense contracts. *United States v. Hess*, 317 U.S. 537, n.12 (1943). The original debates from the 1863-4 Congress centered around individual plunderers. In 1863, the foremost interest of Congress and the Presidency was holding what was left of the Union together. Any interpretation of the FCA which disrupted that delicate and precarious balance would clearly not have been intended. To do so, the intent must be "plainly stated" and "unmistakable." The statute and the legislative history are silent.

VII. THE ELEVENTH AMENDMENT BARS PETITIONER'S CLAIMS. THE STATE IS THE REAL PARTY IN INTEREST.

When State officials assert immunity as a defense, courts must determine whether the "real, substantial party in interest" is actually the State. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), quoting *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). This standard is applicable to individual capacity claims as well. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). There, the Court addressed Eleventh Amendment immunity in the context of a suit naming numerous State officials in their individual capacities.

> When suit is commenced against State officials even if they are named and served as individuals the State itself will have a continuing interest in the litigation whenever State policies or procedures are at stake . . . Eleventh Amendment immunity represents a real limitation on a federal court's federal question jurisdiction. The real interests served by the Amendment are not to be sacrificed to elementary mechanics of captions and pleadings.

521 U.S. at 269-70.

To hold that individual administrators, as "persons," may be sued for conduct which Relators fail to allege is anything other than on behalf of the State, while also holding that the Constitution prohibits the State itself from being sued would undermine the Supreme Court's

decisions in *Garrett, Kimel and Seminole Tribe*.[1] Relators could easily, as they have transparently attempted here, evade the Eleventh Amendment merely by naming the administrator.

A suit is against the sovereign "if the effect of the judgment would be to restrain government from acting or compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963). Relator has conceded Iowa's administrative rules and statutes are in compliance with Federal statutes and regulations. Gesaman is accused of violating a State administrative rule only. A request for a Federal court to intervene in the interpretation of those rules directly calls into question the sovereignty of the State. The irony of the assertion by Relator, that *Hafer* must control this case lies here: if this were, like *Hafer*, a section 1983 suit, there would be no jurisdiction of the federal courts to order the State to comport its conduct to its own administrative rules.

> In the States there is an ongoing process by which State courts and agencies work to elaborate an administrative law designed to reflect the State's own rules and traditions concerning the respective scope of judicial review and administrative discretion. . . .

Coeur d'Alene Tribe, 521 U.S. at 307.

There are literally hundreds of financial and contractual relationships between the State and the Federal

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[1] *Board of Trustees of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

government, not only involving Medicaid, as this one, but all facets of government, including but not limited to transportation, natural resources, criminal investigation and prosecution, child support collection, tax collections, licensing and regulation, and agriculture. Those relationships are subject to monitoring, audit, and financial recovery pursuant to contract. Under Relator's theory, every audit, every claim, every contract would be subject to the "indignity of having each discrete decision . . . [of the state employee charged with implementation of state policies] subject to second guessing by a federal court." *Lizzi*, 255 F.3d at 137; *see also Alden v. Maine*, 119 S. Ct. 2240, 2264-65 (1999). Each judicial decision that a State administrator has violated a State policy would compel the State to change, not the rule, but its own interpretation of that rule or policy. "Where as here, the parties invoke federal principles to challenge State administrative action, the courts of the State have a strong interest in integrating those sources of law within their own system for the proper judicial control of State officials." *Coeur d'Alene*, 521 U.S. at 308.

The relief now purportedly sought from Gesaman's own personal assets is collection of what is alleged to be Federal dollars wrongly paid to the State. There is no question, the debtor is the State, not Mr. Gesaman. Through its contractual relationship with the Federal government, the State has always remained liable for monies wrongfully paid (frankly through offset methods far more efficient than this federal litigation). The State will necessarily have to be involved in this litigation despite its immunity.

CONCLUSION

Relator may not, merely through the artifice of inserting the descriptive word "individual," but without more, change its official acts claim against Gesaman, given the previous allegations, and the progress of this litigation. The distinction between official and personal capacity suits is "more than a mere pleading device."

Respectfully submitted,

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